Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT A. NEINAST,

Petitioner

v.

BOARD OF TRUSTEES OF THE COLUMBUS METROPOLITAN LIBRARY, PATRICK A. LOSINSKI, AND VONZELL JOHNSON,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Robert Neinast was evicted multiple times from the Columbus Metropolitan Library for using its facilities without shoes. The state, county, and city health departments do not require shoes in public buildings; nor do the Library's own patron regulations have a shoe requirement. The Library does, however, have an eviction procedure for shoeless patrons, labeled "Inappropriate Dress." The questions presented are:

1. Whether a person may be denied access to a First Amendment public forum, in this case a public library, based upon unsupported assertions of harms, particularly when such speculation is clearly a pretext masking general disapproval of an unconventional style of dress.

2. Whether Neinast's liberty interest in his personal appearance, protected by the Due Process Clause of the Fourteenth Amendment, was infringed by the Library.

PARTIES

All parties in this matter are named in the caption.

Patrick A. Losinksi is the current Executive Director of the Columbus Metropolitan Library. He has been substituted in place of Larry D. Black, who was the Executive Director of the Library during the proceedings below. Mr. Black retired on June 28, 2002. Although Mr. Black was originally sued in both his official and personal capacities, he was granted qualified immunity in the District Court opinion; this grant was not appealed. Thus, Mr. Losinski is a party in his official capacity only.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert A. Neinast respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on October 10, 2003.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-19a) is reported at 346 F.3d 585. The order denying the timely petition for rehearing and for rehearing *en banc* (App., *infra*, 36a-37a) is unreported. The memorandum opinion of the district court (App., *infra*, 20a-35a) is reported at 190 F.Supp.2d 1040.

JURISDICTION

The judgment of the court of appeals was issued on October 10, 2003, and the petition for rehearing and for rehearing *en banc* was timely filed on October 23, 2003 and denied on December 19, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech ...." The Fourteenth Amendment to the United States Constitution provides that "... nor shall any State deprive any person of life, liberty, or property, without due process of law ...."

The Ohio Revised Code § 3375.40 states, in relevant part:

> Each board of library trustees ... may:
>
> (H) Make and publish rules for the proper operation and management of the free public library and facilities under its jurisdiction, including rules pertaining to the provision of library services to individuals, corporations, or

institutions that are not inhabitants of the county;

...

The Columbus Metropolitan Library Patron Regulations Policy (approved by the Board of Trustees) states:

> The following are prohibited in the Library by either the policies of the Board, or fire or health regulations:
>
> 1) Smoking in all service areas including meeting rooms and restrooms.
> 2. Eating in public service areas, except for official Library functions. Non-alcoholic beverages in closed containers may be consumed.
> 3. Pets, with the exception of animals serving impaired and/or disabled patrons.
> 4. Loud or abusive language.
> 5. Sleeping.
> 6. Action which is disruptive or distracting to others.
> 7. Making harassing phone calls to staff.
>
> Staff who observe any of these actions should politely ask the patron to stop. ...

STATEMENT OF THE CASE

This case was filed as a 42 U.S.C. § 1983 lawsuit in the Franklin County (Ohio) Court of Common Pleas. Defendants removed it to Federal district court pursuant to 28 U.S.C. § 1441(b). The district court had jurisdiction pursuant to 28 U.S.C. § 1331. The Sixth Circuit court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Petitioner Robert Neinast goes barefoot nearly continuously. He has done so at most businesses and state offices, including Wal-Mart, Galyans Sporting Goods store, and Rite-Aid Pharmacy. He has done so in the U.S. Capitol building and the Smithsonian Institute (C.A.App., 60-62). Federal Statutes and Regulations have no prohibition on citizens using Federal facilities barefoot. *See, e.g.*, Post

Office Building Regulations, 39 CFR 232.1; Smithsonian Regulations, 36 CFR 504; GSA regulations on Conduct in Federal Buildings, 41 CFR 101-20.3; and regulations for Capitol Buildings and Grounds, 40 U.S.C. §§ 193-193x. There is no evidence of any other governmental unit, state or federal, requiring shoes in its buildings.

In 2000 and early 2001, Neinast, who is a member of the Columbus Metropolitan Library, used the Reynoldsburg branch of the Library barefooted twenty times without being stopped or questioned. He also used the Main Library barefooted nine times during that period. Of those nine times, he was stopped three times by Main Library security and evicted (C.A.App., 63-65). The third time Neinast was additionally evicted from the Library for the remainder of the day and informed that the severity of further evictions would be "progressive." (C.A.App., 75, 76.) At all times Neinast was using the Library for its intended purpose: accessing the materials available there (C.A.App., 64). There is no evidence in the record that his being barefoot disturbed or annoyed any other patrons (C.A.App., 74).

Neinast filed suit against the Library in April, 2001, contending that the evictions violated his First Amendment right to receive the information available in the Library by denying him access, and they violated his liberty interest in his personal appearance.[1] All courts that have addressed the issue are in agreement that public libraries are designated (or limited) public forums. *See, particularly, Kreimer v. Bureau of Police*, 958 F.2d 1242, 1259-60 (3rd Cir. 1992).

Although the Library's Patron Regulations have no prohibition on using the facilities barefoot, the Library has an Eviction Procedure that makes going shoeless a Type 1

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[1] He also claimed a violation of the First Amendment in that his bare feet were conveying a message; and a due process violation in the way the eviction procedure was carried out. These claims are no longer part of this action.

infraction: "Inappropriate dress, to include but not limited to: no shirts and no shoes. ...." (C.A.App., 86-87.) When Neinast wrote letters to the Board of Trustees, the Executive Director wrote to the Franklin County Prosecutor's Office, asking for "the legal reasons that [the Library] can give for requiring its customers to dress appropriately for a public place." (C.A.App., 94.) However, in defending the suit, the Library advanced the following two rationales for the policy: 1) it protects the health and safety of Library patrons; and 2) it protects the fiscal integrity of the Library by avoiding tort lawsuits for injuries. These rationales were supported by a contemporaneous affidavit from the Executive Director of the Library (C.A.App., 46-47).

On cross-motions for summary judgment by the Library and Neinast, the district court assumed that Neinast had a right of access to the speech in the Library and analyzed the shoe policy under intermediate scrutiny. It granted the Library's motion. In that analysis, it went no further in its examination of the evidence than to say:

> "The shoe requirement is a valid, content-neutral regulation that promotes communication of the written word in a safe and sanitary condition. As evidenced by various incident reports, the Library's floor sometimes contains feces, semen, blood, and broken glass, all of which pose a significant danger to barefoot individuals. The Library determined that a blanket prohibition on walking barefoot was a reasonable means of minimizing these dangers." App., *infra*, 26a.

There was no evidence presented that indicated how feces or the other incidents were a particular danger to barefooted individuals[2], or that the Library had a problem regarding injuries to barefooted patrons that needed to be addressed. Furthermore, the district court ignored the fact that there are no health code regulations requiring shoes in public buildings (and the deduction that the lack of such

regulations implies no cognizable danger) (C.A.App., 59-60, 66-68, 73). Also ignored was the fact that the Library's insurance policy has no requirement that the Library enforce a shoe policy (and the deduction that the lack of such requirement implies no litigation concern) (C.A.App., 74). The court assumed that the conditions in the Library were dangerous to bare feet and accepted the common myth that walking barefoot is dangerous (C.A.App., 59-60, 92-93).

The district court's only mention of the Library's second rationale for the policy was in summing up:

> "The Eviction Procedure was used to promote legitimate interests such as the safety of all library patrons and the fiscal integrity of the Library in preventing possible lawsuits." App., *infra*, 32a.

The court of appeals upheld the grant of summary judgment for the Library. It recognized public libraries as designated public forums but decided that, even though the Library policy was a time, place, and manner restriction, intermediate scrutiny was not appropriate and the rational basis standard was applied. The court said:

> "While the Library regulation at issue in this case is also content-neutral, it does not directly impact the right to receive information. Therefore, applying the heightened scrutiny standard of *Ward* [*v. Rock Against Racism*, 491 U.S. 781] to the Library regulation is not appropriate." App., *infra*, 8a.

However, the court of appeals went on to say that the shoe policy would also survive heightened scrutiny. The

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[2] For instance, while there was one case of a barefoot little girl getting the top of her toe scraped by an opening door, if she had been wearing sandals, the same injury would have resulted. The paramedics that were called to the scene called the injury "not serious." There was a similar incident in which a fully shod woman nearly broke her foot from such a misaligned door. (C.A.App., 297, 301.)

court did a more extensive analysis of the incident reports of purported hazards. These reports spanned the period from December, 1996, through August, 2001, a period of about 4½ years. There were 99 such incident reports, which covered all 22 of the Library's locations (C.A.App. 123-313). The court of appeals identified 26 incidents of interest as being relevant to the case (the remaining incidents were such things as slip-and-falls on ice in a library parking lot). App., *infra*, 11a-14a. This amounts to 0.26 incidents per location per year. These incidents related to feces, urine, blood, vomit, and the two incidents already mentioned, *supra*, 5, fn. 2. There was also an incident in which a boy at storytime scraped his arm on a staple on the floor, but there is no Library Regulation preventing children from playing on the floor (C.A.App., 130, 260, 314-327). Again there was no evidence presented that indicated how feces or the other incidents were a particular danger to barefooted individuals, or that the Library had a problem regarding injuries to barefooted patrons that needed to be addressed. The court of appeals nonetheless concluded, "The Board thus has demonstrated the existence of a significant health and safety risk to individual barefooted patrons." App., *infra*, 12a.

Regarding the Library's second rationale for the shoe policy, Appellant's Brief did not even argue that issue. However, the court of appeals identified "the expense of litigation" as "a legitimate governmental interest," likened any injury to a barefooted patron to that which might occur to a motorcycle rider riding without a helmet, App., *infra*, 12a, and concluded:

> "Similarly, in this case barefoot patrons of the Library who are injured as a result of the hazards previously described impose costs on the general public. For these reasons, we conclude that the Board has demonstrated a significant governmental interest in requiring that patrons of the Library wear shoes." App., *infra*, 13a.

No evidence or estimate of those costs was presented. No case of a barefooted customer of any business suing that business was cited.

The court of appeals also addressed Neinast's claim of pretext by the Library. Although the court acknowledged the Library's previous focus on proper attire, the change in the governmental interest reflected in the affidavit that the Executive Director prepared for the lawsuit was considered acceptable, because, "Neither the district court nor this court manufactured these reasons." App., *infra*, 11a, fn. 2.

Regarding Neinast's personal appearance liberty interest claim, both courts analyzed it using the rational basis standard. Since the policy was deemed to have survived intermediate scrutiny, it also necessarily survived the rational basis standard.

REASONS FOR GRANTING THE PETITION

The court of appeals has fashioned a "we disapprove" exception to the First Amendment. The method by which the court has done so is in conflict with other Circuits in three ways:

A. The decision directly conflicts with the framework of *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) for analyzing public library regulations.

B. The decision conflicts in general with other Circuits' method of analyzing various time, place, and manner restrictions. There is confusion in determining harms, in determining what level of speculation is allowed, and in determining what evidence is sufficient.

C. The decision conflicts in general with other Circuits' acceptance of pretextual and *post hoc* rationalizations under First Amendment scrutiny and excuses the restriction of speech under the ruse of a dress code.

This case presents an important constitutional question regarding access to First Amendment public forums, and whether what "everybody knows," when such knowledge is simply a common myth[3], is sufficient justification to deny access to a public forum without further examination. This Court's review is therefore warranted.

A. The Court of Appeals Opinion Directly Conflicts with the Framework of *Kreimer* for Analyzing Public Library Regulations

In *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992), the Third Circuit set up the framework that has been used ever since in analyzing public library conduct regulations. All courts that have heard the issue, including the Sixth Circuit, have agreed that the right to receive speech is co-equal with the right to make speech ("If there is a right to advertise, there is a reciprocal right to receive the advertising ...." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 757 (1976)), and that public libraries are designated (or limited) public forums dedicated to the receipt of the speech available therein. *Kreimer*, 958 F.2d at 1255, 1260.

The analysis in *Kreimer* is thorough and compelling: regulations regarding patron behavior when the patron is not using the library for its intended purpose (such as sleeping or harassing library staff) need only be reasonable and follow the rational basis standard; regulations regarding patron behavior while the patrons are engaged in using the library for its intended purpose (receiving speech by accessing Library materials) are subject to the stricter intermediate standard of review required for time, place, and manner restrictions, since otherwise the regulation "would require the expulsion of a

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[3] One billion people worldwide live barefoot without difficulty. Edward Tenner, *Our Own Devices: The Past and Future of Body Technology* (Alfred A. Knopf, New York, 2003), p. 53.

patron who might otherwise be peacefully engaged in permissible First Amendment activities within the purpose for which the Library was opened, such as reading, writing or quiet contemplation." *Kreimer*, 958 F.2d at 1264. In the instant case, Neinast was clearly using the Library for its intended purpose.

The influence of *Kreimer* is demonstrated by the other library cases that have endorsed and applied that framework: *Mainstream Loudoun v. Bd. of Trustees of the Loudoun Cty. Library*, 24 F.Supp.2d 552 (E.D.Va. 1998); *Armstrong v. District of Columbia Public Library*, 154 F.Supp.2d 37 (D.D.C. 2001); *Wayfield v. Town of Tisbury*, 925 F.Supp. 880 (D.Mass. 1996); *Brinkmeier v. City of Freeport*, 1993 U.S. Dist. LEXIS 9255, 1993 WL 248201 (N.D. Ill. 1993). These cases were not even appealed, almost assuredly due to their obvious correctness in their application of the *Kreimer* decision.

The principal holding of the Sixth Circuit in the instant case is that the time, place, and manner analysis in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) does not apply to a library regulation restricting access by patrons, since "it does not directly impact the right to receive information," and that "[t]herefore, applying the heightened scrutiny standard of *Ward* to the Library regulation is not appropriate." It is not clear how it can be claimed that preventing a patron from using the Library "does not directly impact the right to receive information." Nonetheless, this holding directly conflicts with the *Kreimer* framework, and throws the previously settled state of the law regarding libraries into confusion. This is a recurring national issue; the *Kreimer* decision can no longer be relied on by other courts.

This reduction in scrutiny for particular time, place, and manner restrictions is unique to the Sixth Circuit,[4] and does not agree with this Court's precedent. However, the confusion in the Circuits regarding time, place, and manner restrictions that limit access to First Amendment public forums is not limited to Library cases. In *Weinberg*

v. City of Chicago, 310 F.3d 1029 (7th Cir. 2002), an ordinance restricting the sale of books outside Chicago's United Center arena was found to be an impermissible prior restraint on free speech. The confusion is found in the dissent to the denial of a rehearing *en banc*, in which Judge Easterbrook wrote:

> "This case presents the question whether the first amendment (applied to the states by the fourteenth) requires state and local governments to make speech exceptions to laws regulating conduct—here, the sale of merchandise. ... Whether governments must make speech exceptions to neutral statutes is an important and recurring question, here and in other circuits ... Why can't peddling-control ordinances cover sales of literature? Economic laws of general application are valid if supported by any rational basis, and the government receives the benefit of all plausible inferences." *Weinberg v. City of Chicago*, 320 F.3d 682, 683-84 (7th Cir. 2003).

In another case involving the right of access to receive speech, *Potts v. City Of Lafayette, Indiana*, 121 F.3d 1106 (7th Cir. 1997), intermediate scrutiny was applied to the time, place, and manner restriction on attending a Ku Klux Klan rally. There was no finding that this access restriction did not "directly impact the right to receive information," nor that the rational basis standard applied.

This Court is warranted in stepping in to protect and clarify, not only the right of access to public libraries, but

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[4] The Sixth Circuit is not even consistent with itself. In *Grider v. Abramson*, 180 F.3d 739 (6th Cir. 1997), restrictions on access to receive the speech at a Ku Klux Klan rally were subject to strict scrutiny (while the restriction was considered a time, place, and manner restriction, it was analyzed under strict scrutiny instead of intermediate scrutiny because of anticipated listener reaction to the content of the speech).

also the general right of access to First Amendment public forums.

B. The Court of Appeals Opinion Conflicts in Principle with the Standards for Analyzing Time, Place, and Manner Restrictions

After stating its principal holding, the court of appeals went on to say that, if intermediate scrutiny were applied, the Library policy would survive it. However, the standards by which the court of appeals applied intermediate scrutiny to the policy conflict in many respects with the other Circuits and with this Court.

Under Supreme Court precedent for intermediate scrutiny "[w]hen the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms ... [i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way," *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994). Furthermore, "[w]hen the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions," *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816 (2000); "[t]his burden is not satisfied by mere speculation or conjecture," *Edenfield v. Fane*, 507 U.S. 761, 770 (1993); and "a 'reasonable' burden on expression requires a justification far stronger than mere speculation about serious harms," *United States v. National Treasury Employees Union*, 513 U.S. 454, 475 (1995). Although briefed, the court of appeals simply ignored this precedent.

These standards are sporadically applied throughout the Circuits. For instance, the *Kreimer* court applied them scrupulously: there was clear and strong evidence that Richard Kreimer's odor disturbed other patrons and that Kreimer stalked or stared at library employees, preventing them from doing their work.[5] However, in *Potts*, 121 F.3d at 1111, there was no evidence that small tape recorders presented any more danger than other

allowed items, or were any less dangerous in the hands of official press. ("[Potts] argues that the City itself did not view tape recorders as dangerous, [since] it allowed members of the media to enter the rally with [them]. Potts further points out that the City permitted individuals to take in ... items which present no less danger than a micro cassette recorder.") Speculation on the danger of micro cassette recorders was deemed sufficient for this restriction on access to the public forum.

In *Weinberg*, 310 F.3d at 1038, speculation on the dangers of congestion at the United Center was not accepted:

> "In the context of a First Amendment challenge under the narrowly tailored test, the government has the burden of showing that there is evidence supporting its proffered justification. The City contends that because there is heavy traffic around the United Center, safety concerns justify the ordinance. On its face, this contention is hard to dispute. However, First Amendment rights demand more than mere facial assertions. It is true that the government may rely upon its own "real-world experience" in enacting regulations, but the City cannot blindly invoke safety and congestion concerns without more." [Citations omitted.]

Furthermore, that court went on to say:

> "The City of Chicago has provided no objective evidence that traffic flow on the sidewalk or street is disrupted when Mr. Weinberg sells his book. The City offered no empirical studies, no police records, no reported injuries, nor evidence of any lawsuits filed. ... [T]he only evidence the City offered was

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[5] In the instant case the court of appeals correctly recognized that the *Kreimer* court's comments regarding the footwear rule were *dicta*, since that issue was not before the court. No analysis of the rule was performed. App., *infra*, 9a.

based on speculation as to what might happen if booksellers could sell their books and the cumulative effect this might have on pedestrian traffic." *Weinberg*, 310 F.3d at 1039.

In leafletting cases, which also address the right of access to public forums, the courts have carefully examined the claims that such leafletting presented danger of traffic congestion, safety, sanitation or security, and found such claims unsupported and speculative. *See, e.g., Lederman v. United States*, 291 F.3d 36, 43, 44 (D.C.Cir. 2002) ("If people entering and leaving the Capitol can avoid running headlong into tourists, joggers, dogs, and strollers—which the Government apparently concedes, as it has not closed the sidewalk to such activities—then we assume they are also capable of circumnavigating the occasional protester.") ("We 'closely scrutinize' challenged speech restrictions 'to determine if [they] indeed promote[ ] the Government's purposes in more than a speculative way.'"); *Jews for Jesus Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1325 (1st Cir. 1993) ("The record, moreover, does not support the Authority's fears. ... We therefore affirm the district court's determination that the evidence did not demonstrate a causal connection between leafletting and litter-related safety problems."); *Paulsen v. County of Nassau*, 925 F.2d 65, 71 (2nd Cir. 1991) ("Though appellants raise legitimate concerns that unrestrained leafletting may pose substantial safety hazards, they have in the past permitted the distribution of advertisements related to Coliseum events. *We take this as a strong indication that, for the right price, the dangers asserted are not unduly grave.*" (emphasis added)).

In the instant case, the Library presented, and the court of appeals approved of, evidence that, on rare occasions, feces, urine, or vomit might be on its floors. But there is no evidence presented that these present any sort of danger to a barefooted patron. The Library could easily have presented an affidavit from the Columbus Board of

Health that such a danger existed, except, of course, for the fact that the Board of Health recognizes no such danger, as evidenced by its lack of regulation of bare feet in public buildings. The court of appeals approved of a staple on the floor as a cognizable danger to barefooted patrons, yet ignored the fact that the boy injured was injured on his *arm*[6] lying on the floor during a storytelling period, and ignored the fact that the Library has no regulation preventing children from being on those floors. This is a strong indication that, as long as it does not involve the disapproval of bare feet, "the dangers asserted are not unduly grave." Even the two foot injuries presented, *supra*, 5, fn. 2, had nothing to do with being barefooted. Other government buildings might be expected to occasionally have similar conditions, yet *none* of them have a similar shoe policy limiting patron access.[7] *Supra*, 2-3. The court of appeals approved the policy based on mere speculation and ignored the evidence contrary to that speculation.

The court of appeals also cited a fear of unjustified[8] lawsuits as an acceptable rationale for the shoe policy. However, nothing was presented to show that barefooted patrons are wont to be injured and sue.[9] Out of the vast array of tort actions that might be possible in the Library,

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[6] The incident was resolved by placing a band-aid on the boy's arm. A similar resolution would suffice for a barefooted patron.

[7] There was no suggestion that libraries contain some unique hazard differentiating them from other governmental entities, which hazard might justify a requirement of mandatory safety equipment (shoes).

[8] Unjustified since, under Ohio law, a library patron is a licensee, and the Library need only "refrain from wanton and willful conduct" that might injure the patron. *Fuehrer v. Westerville City School Dist. Bd. of Edn.*, 61 Ohio St.3d 201, 204, 574 N.E.2d 448, 450 (1991). No evidence was presented that the Library was so lax. Furthermore, the principle of "assumption of the risk" would likely apply.

the Library singled out bare feet, not because of some special problem the Library was having, but because bare feet were deemed "inappropriate dress". Most egregiously, the court of appeals did not even identify this governmental interest as substantial, as required for intermediate scrutiny ("Avoiding the expense of litigation is a *legitimate* governmental interest", App., *infra*, 12a (emphasis added)).

The language of the Library, as approved by the court of appeals, was even speculative: "may be harmed," "could have suffered injuries," "potential claims," and "could have prevented." App., *infra*, 10a. In fact, there was simply no

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[9] For a barefooted injury inside a publicly accessible building (not a pool or spa), a search on Lexis-Nexis finds only *Anderson v. Racetrac Petroleum, Inc.*, 296 S.C. 204, 371 S.E.2d 530 (S.C. 1988). Even an annotated report, "Duty and liability respecting condition of store or shop", from 1936, a time when folks went barefooted more frequently, contains not a single reference to a barefooted injury. 100 A.L.R. 710. However, published opinions are replete with instances of lawsuits in which the choice of shoe is implicated in an injury. *See, e.g.* — **Heels**: *Blumberg v. M. & T. Inc.*, 34 Cal.2d 226, 209 P.2d 1 (Cal. 1949); *Burns v. Schnuck Markets*, 719 S.W.2d 499 (Mo.App.Div.3 1986); *Jones v. Hyatt Corporation of Del.*, 681 So.2d 381 (La.App.4.Cir. 1995). **Worn-down shoes**: *Harsha v. Renfro Drug Co.*, 77 S.W.2d 584 (Tex.Civ.App. 1934). **Golf shoes**: *Beauchamp v. Los Gatos Golf Course*, 273 Cal.App.2d 20, 77 Cal.Rptr. 914 (Cal.App.Dist.1 1969); *Bezozo v. Town of Hempstead*, 686 N.Y.S.2d 489 (N.Y.App.Div. 1999). **Platform shoes**: *Brown v. McDonald's Corp.*, 428 So.2d 560 (La.App.4.Cir. 1983); *Johnson v. City of Chicago*, 431 N.E.2d 1105, 103 Ill. App.3d 646 (Ill.App.1 1981). **Flip-flops**: *Love v. The Waterbed Sleep Shoppe*, 652 So.2d 650 (La.App.1.Cir. 1995); *Estes v. Wal-Mart Stores, Inc.*, 800 So.2d 1018 (La.App.5.Cir. 2001). Based on these, and a plethora of other similar lawsuits, the Library would have stood on firmer ground if it had chosen to ban high-heels, worn-down shoes, golf shoes, platform shoes, and flip-flops. However, if the Library had denied access by singling out high-heels, it is unlikely the courts would have accepted speculation about supposed dangers or accepted a liability rationale.

evidence that the Library was having any sort of problem at all with barefooted patrons being injured, or that there was any sort of problem that needed to be addressed by this shoe policy. The Library, supported by the court of appeals, targeted bare feet for its disapproval as "inappropriate dress."

The Circuits are simply inconsistent when it comes to applying the standards of intermediate scrutiny to accessing public forums, and require guidance from this Court. If the instant case is allowed to stand, the unpopular can be excluded from attending events at public forums on the whim of public officials. For instance, attendance at rallies could be predicated on the attendees wearing white shirts and ties, based on the speculation of violence, and that being dressed nicely would reduce that violence. Exclusion would be based on how clever the public officials were in their speculations.

Finally, the court of appeals departed from this Court's precedent regarding summary judgment. The evidence regarding supposed dangers, the lack of Health Department regulations, the lack of insurance requirements, and the lack of lawsuits from barefoot injuries should have been interpreted in Neinast's favor, but this was not done. Such a departure from clear precedent, particularly as it involves limiting free speech on the pretense of regulating an unpopular mode of dress, justifies this Court's intervention and supervision.

C. The Circuits are Inconsistent in Analyzing Pretext Under the First Amendment

It is clear from the record that bare feet were banned in the Library because they were considered "inappropriate dress,"[10] and that the safety and lawsuit justifications were mere pretext. The court of appeals

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[10] Yet sandals or flip-flops, which expose just as much of the foot, are considered acceptable.

acknowledged that there was "some evidence" of pretext, but explained that that rationale was acceptable, since it was the Library, not the court itself, that had manufactured the pretext. App., *infra*, 11a, fn. 2.

The issue of pretext, even under the weaker "reasonableness" standard for non-public forums, is also an area in which the Circuits are in conflict. In rejecting the acceptance of pretext regarding newsracks in airports, the Fourth Circuit said, "The district court did not err in determining that the governmental interests asserted as justification for the ban were *post hoc*, pretextual creations, which were not shown to have been significantly threatened by the conduct banned." *Multimedia Publishing Co. v. Greenville-Spartanburg Airport District*, 991 F.2d 154, 162 (4th Cir. 1993). While accepting pretext in *Grossbaum v. Indianapolis-Marion County Building Authority*, 100 F.3d 1287 (7th Cir. 1996), the Seventh Circuit also said, "Our holding today is expressly limited to speech regulations in nonpublic fora. We express no opinion on the harder issue of whether motive is relevant in public forum cases." *Id.*, at 1299, fn. 11. The Eighth Circuit, acknowledging the impropriety of using pretext, said, "The district court concluded that this rationale [(bomb concealment in a newsrack)] was mere pretext because the terminal has many other places where a bomb could be hidden, ..." *Jacobsen v. City of Rapid City*, 128 F.3d 660, 663 (8th Cir. 1997). However, the court placed the burden on Jacobsen to come forth with concrete evidence of the impact on him of the newsrack ban. This prompted a dissent: "I dissent from Part II for the reason that it places the burden on Jacobsen with respect to the City's policy restricting his speech." *Jacobsen*, 128 F.3d at 665 (Gibson, J., concurring in part and dissenting in part.)

This Court has obliquely addressed the issue in *Watchtower Bible & Tract Society of New York, et al. v. City of Stratton, et al.*, 536 U.S. 150, 170 (2002), saying,

> "In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative

body has not given. *Cf. United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000) ('When the Government restricts speech, *the Government bears the burden* of proving the constitutionality of its actions' (emphasis added))..... It does mean that ***we expect a government to give its real reasons*** for passing an ordinance." (Breyer, J., concurring) (Italic emphasis in the original; boldfaced emphasis added).

It is important for this Court to resolve and clarify this issue, for burdensome restrictions on speech now depend on the creativity of the government in manufacturing pretextual and *post hoc* justifications, and the government's reliance on common myth.

D. The Right of Personal Appearance Has Been Infringed Absent a Legitimate Governmental Interest

This case also presents issues regarding the liberty interest right of personal appearance. In *Kelley v. Johnson*, 425 U.S. 238 (1976), this Court upheld the right of a police department to determine the dress of its officers. However, this Court also said:

> "Certainly its language cannot be taken to suggest that the claim of a member of a uniformed civilian service based on the 'liberty' interest protected by the Fourteenth Amendment must necessarily be treated for constitutional purposes the same as a similar claim by a member of the general public." *Kelley*, 425 U.S. at 248-49.

The instant case treated a similar claim by a member of the general public the same as that for a member of the uniformed civilian service. This is similar to the way the 11th Circuit dealt with an ordinance requiring shirts to be worn on public streets. *DeWeese v. Town of Palm Beach*, 812 F.2d 1365 (11th Cir. 1987). However, using the

rational basis test, the *DeWeese* court overturned the ordinance, finding the proffered justification was not related to a legitimate legislative goal.

There is no legitimate governmental interest in this case. The district court and the court of appeals have greatly enlarged the sphere of governmental interest in the public health and safety by allowing a regulation solely to protect a person from himself. Such an interest has never before been deemed legitimate. Even when motorcycle helmet regulations have been upheld, it has been on the basis that the massive head injuries that have resulted place a significant burden on the common weal. It is difficult to see how, for instance, the staple incident, which required a 23¢ band-aid, places any burden at all on the public. This is reflected in an April 3, 1969, *San Francisco Chronicle* article (C.A.App., 79), in which the City Attorney Thomas M. O'Connor "pointed out that no law could be adopted to protect barefoot persons from the dangers of street and sidewalk, but only to protect the general public from disease or injury." The rationale that the court of appeals used applies equally well to public streets or even to a public beach, yet no other type of governmental entity requires shoes, either indoors or outdoors. If such a rationale is acceptable, then the Town of Palm Beach in *DeWeese, supra*, could have rescued the constitutionality of its ordinance requiring shirts simply by advancing the pretext that the ordinance protected the citizens from sunburn, mosquito bites, and any diseases transmitted by mosquitoes; and that it furthermore protected the Town from unjustified lawsuits filed by sunburned citizens.

In *Miller v. School District No. 167*, 495 F.2d 658, 664 fn. 25 (7th Cir. 1974), then Judge, now Justice, Stevens, wrote:

> "We do not have a case in which the sovereign insists that every citizen must wear a brown shirt to demonstrate his patriotism. Fortunately, intervention of the federal judiciary has not been

> required during the brief history of our Republic in order to avoid intolerable instances of required conformity like that following the Manchus' invasion of China in 1644, or the official prohibition of beards during the reign of Peter the Great."

Or, these days, we might add the Taliban, or the French regarding Muslim head scarves. Yet here we have the government, using unsupported safety concerns as a pretext for its feelings that bare feet are "inappropriate dress," insisting that shoes be worn instead of leaving it to the citizens to weigh for themselves the risks and benefits of their clothing choices.

This unwarranted expansion of governmental power warrants this Court's supervision.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the court of appeal's judgment.

Respectfully submitted.

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MARCH 2004

APPENDIX A

346 F.3d 585

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROBERT A. NEINAST,
Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF THE COLUMBUS METROPOLITAN LIBRARY; LARRY D. BLACK; VONZELL L. JOHNSON,
Defendants-Appellees.

No. 02-3482

Appeal from the United States District Court
for the Southern District of Ohio at Columbus,
No. 01-00443—Algenon L. Marbley, District Judge.

Submitted: August 1, 2003

Decided and Filed: October 10, 2003

Before: KENNEDY, GILMAN, and GIBBONS, Circuit Judges.

COUNSEL

ON BRIEF: Philomena M. Dane, Johnathan E. Sullivan, SQUIRE, SANDERS & DEMPSEY, Columbus, Ohio, for Appellees. Robert A. Neinast, Pickerington, Ohio, pro se.

OPINION

JULIA SMITH GIBBONS, Circuit Judge. Robert A. Neinast, a patron of the Columbus Metropolitan Library (Library) was evicted from the Library as a result of going barefoot. Neinast brought suit against the Board of Trustees of the Columbus Metropolitan Library (Board) and others under 42 U.S.C. § 1983, claiming violations of his rights under the First, Ninth, and Fourteenth Amendments of the United States Constitution, Article I of the Ohio Constitution, and Ohio Revised Code § 3375.40. All parties moved for summary judgment. The district court granted summary judgment in favor of defendants-appellees. For the reasons set forth below, we affirm the judgment of the district court.

I.

Plaintiff-appellant Neinast, a resident of Pickerington, Ohio, regularly goes barefoot and often uses the Library. Defendant-appellee Board serves as the regulating authority of the Library and is authorized by Ohio Revised Code § 3375.40 to "[m]ake and publish rules for the proper operation and management of the free public library and facilities under its jurisdiction, including rules pertaining to the provision of library services to individuals, corporations, or institutions that are not inhabitants of the county." Defendant-appellee Larry D. Black is the Executive Director of the Library, and defendant-appellee

Vonzell Johnson is the Assistant Manager of Security for the Library. Although the Patron Regulations of the Library (approved by the Board) do not contain a prohibition on using the Library without shoes, the Library's Eviction Procedure (approved by the Executive Director) does provide that patrons not wearing shoes be given a warning and be "asked to leave [the] premises to correct the problem."

On several different occasions between 1997 and 2001, Neinast was asked to leave the Library for failure to comply with the Library's requirement that patrons wear shoes while on its premises. Neinast first was asked to leave the Library for not wearing shoes on September 12, 1997. On November 10, 2000, Neinast again was informed that he would have to wear shoes in order to use the Library's facilities and was asked to leave. On January 23, 2001, Neinast was asked to leave for the same reason. On March 2, 2001, Neinast again entered the Library barefoot, and subsequently was approached by two security officers and taken to the security desk, where one of the officers, acting under the supervision of Johnson, presented Neinast with a one-day eviction from the Library.

After being asked to leave on November 10, 2000, Neinast wrote a letter to Black dated November 16, 2000, and a letter to the Board dated December 11, 2000, complaining of the enforcement of the Eviction Procedure and the procedure's alleged inconsistency with the Patron Regulations. In a response dated December 14, 2000, the Board informed Neinast that Black had "the authority to make such decisions" and that the Board believed that Black "had made the correct one." According to the Library Organization Policy, Black (as the Executive Director) is responsible for "determining internal policies and procedures, ... public relations, relations with the community and governmental agencies, and the handling of all other matters involved with the operation of the library system."

On January 19, 2001, Neinast wrote another letter expressing his concerns about the prohibition on using the Library without shoes, and on January 30, 2001, Black asked the Franklin County Prosecutor's Office "for the legal reasons that [the Board] can give for requiring its customers to dress appropriately for a public place." In a letter dated February 7, 2001, the prosecutor's office responded that in accordance with *Kreimer v. Bureau of Police of Morristown*, 958 F.2d 1242 (3d Cir. 1992), "the Library may implement reasonable rules for the operation of the Library or the conduct of Library business, including a requirement that patrons wear shoes while in the library."

On March 5, 2001, following his one-day eviction from the Library on March 2, 2001, Neinast sent another letter to Black, the Board, and the prosecutor's office. On March 12, 2001, Black informed Neinast that he had "been made aware that we require our customers to wear shoes while using the Columbus Metropolitan Library facilities" and that he had been "provided a legal opinion ... stating that the Library has the legal authority to make and enforce such a rule," and concluding that the Library "will not respond to further correspondence on this matter."

On April 3, 2001, Neinast, acting *pro se*, filed a complaint in the Franklin County Court of Common Pleas alleging violations of 42 U.S.C. § 1983 based on deprivations of his First, Ninth, and Fourteenth Amendment rights under the United States Constitution and his rights under Article I of the Ohio Constitution. Defendants-appellees removed this case to the United States District Court for the Southern District of Ohio on May 11, 2001 and filed an answer on May 24, 2001. Neinast filed an amended complaint on June 27, 2001. On July 9, 2001, defendants-appellees filed an answer to the amended complaint. Both parties then filed motions for summary judgment. On March 27, 2002, the district court granted summary judgment in favor of defendants-

appellees. Neinast timely filed his notice of appeal on April 25, 2002.

II.

A district court's grant of a motion for summary judgment is reviewed *de novo*. *See Braithwaite v. The Timken Co.*, 258 F.3d 488 (6th Cir. 2001). Where the parties have filed cross-motions for summary judgment, this court "evaluate[s] each motion on its own merits and view[s] all facts and inferences in the light most favorable to the nonmoving party." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994). However, an opponent of a motion for summary judgment "may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The party opposing the motion must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). "If after reviewing the record as a whole a rational factfinder could not find for the nonmoving party, summary judgment is appropriate." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 349 (6th Cir. 1998) (citing *Matsushita*, 475 U.S. at 587).

A.

Neinast claims that the Board's enforcement of the requirement that patrons of the Library wear shoes deprived him of his right to receive information under the First and Fourteenth Amendments.[1] The district court assumed that Neinast had a First Amendment right of access to the Library, but rejected his claim, finding the Board's requirement that patrons of the Library wear shoes to be "a valid, content-neutral regulation that promotes communication of the written word in a safe and sanitary condition." *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 190 F.Supp.2d 1040, 1044 (S.D.Ohio 2002). The district court concluded that "to the extent that it

limits Plaintiff's right of access to speech, the Library's shoe regulation satisfies this intermediate scrutiny." *Id.* Neinast now argues that the presence of feces, semen, blood, and broken glass in or around the library system, as established by incident reports, fails to represent any danger to barefooted patrons. Neinast asserts that "the shoe policy *is* substantially broader than necessary, even if one assumes that the Library's incidents constitute hazards to barefooted persons." Neinast also claims that the Board's claim of a substantial governmental interest in public safety represents "an expansion of the police power beyond its traditional boundaries."

The First Amendment protects the right to receive information. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). This right to receive information "includes the right to some level of access to a public library, the quintessential locus of the receipt of information." *Kreimer v. Bureau of Police for the Town of Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992); see also *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) ("A library is a mighty resource in the free marketplace of ideas."); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F.Supp.2d 67, 75 (D.D.C. 2001) (noting the existence of "long-standing precedent supporting plaintiff's First Amendment right to receive

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[1] At the district court level, Neinast also asserted that walking barefoot constituted speech protected by the First Amendment, that the shoe regulation violates his equal protection rights, and that the individual defendants were not entitled to qualified immunity. The district court found that Neinast's practice of going barefoot in public buildings did not qualify as symbolic speech, that his equal protection rights had not been violated, and that the individual defendants were shielded from liability. See *Neinast v. Bd. of Trs. of Columbus Metro. Library*, 190 F.Supp.2d 1044-46, 1048-49 (S.D.Ohio 2002). On appeal, Neinast does not challenge these conclusions.

information and ideas, and this right's nexus with access to public libraries").

For the purposes of First Amendment analysis, the Library is a limited public forum. *Kreimer*, 958 F.2d at 1259; *Sund v. City of Wichita Falls, Texas*, 121 F.Supp.2d 530, 548 (N.D.Tex. 2000); *Mainstream Loudon v. Bd. of Trs. of Loudon County Library*, 24 F.Supp.2d 552, 563 (E.D.Va. 1998). As such, the Library "is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum." *Kreimer*, 958 F.2d at 1262. Traditionally, libraries provide a place for "reading, writing, and quiet contemplation." *Id.* at 1261. Not all aspects of a library involve the right to receive information, however. For example, a library that consisted of a card catalog, a circulation desk, and closed stacks would be perfectly capable of allowing patrons to exercise their right to receive information, but would not be a place where patrons could read, write, and quietly contemplate.

As previously noted, the requirement for our consideration provides for the denial of access to the Library based upon a patron's failure to wear shoes. In *Ward v. Rock Against Racism*, the United States Supreme Court reviewed a regulation in which the government "regulate[d] expression" according to a heightened standard of scrutiny. 491 U.S. 781, 791 (1989). Moreover, the Court held that "the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'" Id. (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

In *Ward*, the Court reviewed use guidelines promulgated by the City of New York that only the City

could provide sound equipment and sound technicians for performances given at the Central Park Bandshell. *Id.* at 788. The guidelines summarized their purpose as "insur[ing] appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow." *Id.* The *Ward* guidelines regulation, albeit content-neutral, restricted the volume of speech, and in so doing, had a direct impact on speech. While the Library regulation at issue in this case is also content-neutral, it does not directly impact the right to receive information. Therefore, applying the heightened scrutiny standard of *Ward* to the Library regulation is not appropriate.

Instead we review the Library regulation under a rational basis standard. *See Thompson v. Ashe*, 250 F.3d 399, 407 (6th Cir. 2001) (holding that where there has been no infringement of a fundamental right, review under a rational basis standard is appropriate); *Memphis Am. Fed'n of Teachers, Local 2032 v. Bd. of Ed. of Memphis City Sch.*, 534 F.2d 699, 703 (6th Cir. 1976) (same). "The rational basis test requires the court to ensure that the government has employed rational means to further its legitimate interest." *Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 532 (6th Cir. 1998). Moreover, "[u]nder the rational basis review, a court usually will uphold regulations because 'the state's important regulatory interests are generally sufficient to justify them.'" *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). The Library regulation survives rational basis review because the regulation provides a rational means to further the legitimate government interests of protecting public health and safety and protecting the Library's economic well-being by seeking to prevent tort claims brought by library patrons who were injured because they were barefoot.

B.

Even if we were to conclude that heightened scrutiny is appropriate in the instant case, we believe that the Library regulation would meet this standard. The requirement that patrons of the Library wear shoes is "narrowly tailored to serve a significant governmental interest" and "leave[s] open ample alternative channels for communication of information." *Ward*, 491 U.S. at 791.

In *Kreimer*, a homeless man challenged several public library rules regulating patron behavior, one of which provided that:

> Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.

958 F.2d at 1248. The district court found the rule to be "null and void on [its] face" and enjoined the Library from enforcing the rule, but later modified its order, explaining "that it was not invalidating the rule[] to the extent that [it] required the wearing of shoes or shirts." *Id.* at 1250. The Library appealed, and the Third Circuit reversed the district court. The court noted that the Library "has a significant interest in ensuring that 'all patrons of the [Library] [can] use its facilities *to the maximum extent possible* during its regularly scheduled hours.'" *Id.* at 1264 (emphasis in original). The court explained that the invalidated portion of the rule "prohibits one patron from unreasonably interfering with other patrons' use and enjoyment of the Library" and "further promotes the Library's interest in maintaining its facilities in a sanitary and attractive condition." *Id.* In dicta, the court added that the Library's rules need not "condition exclusion upon actual or imminent disruption." *Id.* The court also suggested that the portion of the rule requiring patrons to wear shoes would pass constitutional muster:

> [I]t seems obvious that the Library may regulate conduct protected under the First Amendment which does not actually disrupt the Library. ... Indeed, the district court itself implicitly acknowledged this point when it modified its order so that it did not invalidate the rule requiring the wearing of shoes, since it can hardly be imagined that a person simply by being barefoot would disrupt the Library.

Id. at 1263 n.25.

In this case, Neinast argues that he was "using the Library for its intended purpose when he was asked to leave, and that his bare feet did not disrupt the library." As the Third Circuit observed in *Kreimer*, however, "the Library is not confined to prohibiting behavior that is actually disruptive." 958 F.2d at 1264 n.28. Here, according to the Board, the requirement that patrons of the Library wear shoes was promulgated "in order to protect the safety of Library patrons from documented hazards within the Library – including blood, feces, semen and broken glass that have, on occasion, been found there." Specifically, in an affidavit dated August 2, 2001, Black stated that he approved the requirement that patrons of the Library wear shoes in order to protect "the health and safety of Library patrons, who may be harmed in the Library if allowed to enter barefoot" and "the economic well-being of the Library, by averting tort claims and litigation expenses stemming from potential claims made by barefoot patrons who could have suffered injuries that shoes could have prevented."[2] These concerns qualify as significant governmental interests.

"Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are primarily, and historically, ... matter[s] of local concern, the States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs,

health, comfort, and quiet of all persons." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (quotations and citations omitted). Here, the Board has provided incident reports documenting various hazards to barefoot patrons, including the presence of feces on the floor of the restroom and in the reading area (JA 133, 153, 163, 176, 197, 212, 250, 252, 254, 256, 257), vomit on the floor of the restroom and in the children's area (JA 170, 224), broken ceiling tiles on the floor of the restroom (JA 134), splintered chair pieces in the children's area (JA 140), drops of blood on the floor of the restroom (JA 184), urine in the elevator, on the floor of the bathroom, on a chair in the reading area, and on the floor of the reading area (JA 161, 165, 168, 176, 266, 276, 291), and broken glass in the lobby (JA 185). The Board also has submitted reports describing incidents where a patron scraped his arm on a staple in the carpet in the meeting room, causing bleeding (JA 260), where a patron's foot went into a gap between the bottom of a door

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[2] Neinast argues that the Board's stated interests are not genuine and notes that the Eviction Guidelines refer only to "[i]nappropriate dress," while making no mention of health and safety or economic well-being. There is some evidence in the record suggesting that the Board had an interest in requiring proper attire. As previously mentioned, in a letter to the Franklin County Prosecutor's Office dated January 30, 2001, Black requested "the legal reasons that [the Library] can give for requiring its customers to dress appropriately for a public place." As the Supreme Court has noted, in the intermediate scrutiny context the state is expected "to give its real reasons for passing an ordinance." *Watchtower Bible and Tract Soc'y of New York, Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring). However, the Court also explained that the state may "rely on the rationale in the courts below," as long as the reviewing court itself "does not supply reasons." Id. at 169-70. In this case, the interests advanced by the Board in the district court and on appeal are reflected in Black's affidavit. Neither the district court nor this court manufactured these reasons. Consequently, consideration of the Board's stated interests in health and safety and economic well-being is appropriate.

and the ground, causing a cut (JA 297), and where a barefoot patron's toe was caught in a door, causing bleeding and requiring the assistance of paramedics (JA 301). The Board thus has demonstrated the existence of a significant health and safety risk to individual barefoot patrons.

Having established the existence of a significant risk of harm to individual barefoot patrons, this court next must determine whether a significant cost to the general public also has been shown. "To justify the state in ... interposing its authority in behalf of the public, it must appear – First, that the interests of the public ... require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.'" *Fair Hous. Advocates Ass'n, Inc. v. City of Richmond Heights*, Ohio, 209 F.3d 626, 643 (6th Cir. 2000) (quoting *Lawton v. Steele*, 152 U.S. 133, 137 (1894)). Courts consistently have upheld statutes primarily directed at preventing injury to an individual on the basis of the impact upon the general public. *See, e.g., Picou v. Gillum*, 874 F.2d 1519, 1522 (11th Cir. 1989) (noting that although the "primary aim" of a state statute requiring motorcycle riders to wear protective headgear "is prevention of unnecessary injury to the cyclist himself," the "costs of this injury may be borne by the public").

Here, the Board's stated rationale for its requirement that patrons of the Library wear shoes is not only to protect individual barefoot patrons from harm to themselves, but also to protect the general public "by averting tort claims and litigation expenses stemming from potential claims by barefoot patrons who could have suffered injuries that shoes could have prevented." Avoiding the expense of litigation is a legitimate governmental interest. See *Listle v. Milwaukee County*, 138 F.3d 1155, 1160 (7th Cir. 1998). Injuries suffered by individual barefoot patrons of the Library also impose broader societal costs. In this case, the Board has

presented evidence that on at least one occasion paramedics were summoned to assist a barefoot patron who suffered an injury to her feet while in the Library. Describing the costs borne by the general public as a result of the failure of motorcyclists to wear helmets, the Eleventh Circuit explained that "[s]tate and local governments provide police and ambulance services, and the injured cyclist may be hospitalized at public expense." *Picou*, 874 F.2d at 1522. Similarly, in this case barefoot patrons of the Library who are injured as a result of the hazards previously described impose costs on the general public. For these reasons, we conclude that the Board has demonstrated a significant governmental interest in requiring that patrons of the Library wear shoes.

In addition, the Board's requirement that patrons of the Library wear shoes is sufficiently narrow. In order to satisfy the "narrowly tailored" requirement, a regulation "need not be the least restrictive or least intrusive means" of serving the government's legitimate, content-neutral interests. *Ward*, 491 U.S. at 798. All that is required is "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469, 480 (1989) (quotation omitted). Neinast argues that the requirement that patrons of the Library wear shoes is not narrowly tailored because although the documented hazards occurred "almost exclusively in the restrooms or outside the Library building," the challenged provision requires that patrons wear shoes "everywhere in the Library buildings, even amongst the books." Close scrutiny of the record, however, reveals that hazards to barefoot patrons can be found throughout the Library buildings. Specifically, the Board has provided evidence that on one occasion feces was found among the books (JA 212), that on one occasion vomit was found in the children's area (JA 224), that on one occasion splintered pieces of a chair were found in the children's area (JA 140), that on three occasions urine was found in the elevator and in the

reading area (JA 161, 266, 291), that on one occasion broken glass was found in the lobby (JA 185), and that on one occasion a staple was found in the carpet of the reading room (JA 260). In light of the fact that the Board has documented the presence of hazards throughout the Library buildings, we find the requirement that patrons wear shoes to be narrowly tailored.

Finally, the requirement that patrons wear shoes leaves open alternative channels for communication. "[S]o long as a patron complies with the rules, he or she may use the Library's facilities." *Kreimer*, 958 F.2d at 1264. In this case, as long as Neinast wears shoes, he may receive information in the Library. Consequently, Neinast may be prohibited from going barefoot while in the limited public forum of the Library.

C.

Neinast asserts that the Board's enforcement of the requirement that patrons of the Library wear shoes deprived him of his right of personal appearance under the First, Ninth, and Fourteenth Amendments. Specifically, Neinast argues that the district court erred by failing "to recognize, as a matter of law, the existence of the right of personal appearance, either as a fundamental right or as a protected liberty interest." Neinast claims that while rational basis review may be appropriate in situations involving government employees, the instant case requires strict scrutiny, since it involves "a member of the general public."

In *Kelley v. Johnson*, 425 U.S. 238 (1976), the Supreme Court observed that "whether the citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personal appearance is a question on which this Court's cases offer little, if any, guidance." *Kelley*, 425 U.S. at 244. Although the Court went on to assume, for the purposes of the case, that a liberty interest existed, it did not affirmatively acknowledge such an interest. *Id.* However, a considerable

body of precedent suggests the existence of a liberty interest in one's personal appearance.

In general, "[l]iberty under law extends to the full range of conduct which the individual is free to pursue." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *see also Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting) (describing liberty as "a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints"). Other circuits specifically have found the existence of a liberty interest in personal appearance. *See DeWeese v. Town of Palm Beach*, 812 F.2d 1365, 1367 (11th Cir. 1987) (prohibiting shirtless male jogger unreasonable); *Domico v. Rapides Parish Sch. Bd.*, 675 F.2d 100, 101 (5th Cir.1982) (noting that "there is a constitutional liberty interest in choosing how to wear one's hair"). "[S]ince *Kelley*, the nation's courts have assumed or found [a liberty interest] in a veritable fashion show of different factual scenarios." *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 321 (2d Cir. 2003).

Assuming the existence of a liberty interest in personal appearance, we must next determine whether the Board unconstitutionally infringed upon Neinast's liberty interest by mandating that he wear shoes in the Library. The Sixth Circuit previously has held that personal appearance is not a fundamental right. *See Gfell v. Rickelman*, 441 F.2d 444, 446 (6th Cir. 1971) ("We are unable to agree with some courts that the freedom of choosing one's hair style is a fundamental right."). Since the Board's requirement that patrons of the Library wear shoes does not implicate a fundamental right, it is subject to rational basis scrutiny. *See DeWeese*, 812 F.2d at 1367; *see also Domico*, 675 F.2d at 102; *Rathert v. Vill. of Peotone*, 903 F.2d 510, 514 (7th Cir. 1990) (reviewing village regulation prohibiting off duty police officers from wearing ear studs under rational basis test).

"Even foolish and misdirected provisions are generally valid if subject only to rational basis review." *Craigmiles v.*

Giles, 312 F.3d 220, 223-24 (6th Cir. 2002). Consequently, this court will not overturn the Board's requirement that patrons of the Library wear shoes unless the varying treatment of barefoot persons "is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [Board's] actions were irrational." *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84 (2000) (quotation omitted). In order to prevail, Neinast must negate "every conceivable basis that might support" the requirement that patrons wear shoes. *Craigmiles*, 312 F.3d at 224 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). Here, as previously discussed, the Board has made the reasonable determination that the requirement that patrons of the Library wear shoes is necessary to protect both "the health and safety of Library patrons, who may be harmed in the Library if allowed to enter barefoot," and "the economic well-being of the Library, by averting tort claims and litigation expenses stemming from potential claims made by barefoot patrons who could have suffered injuries that shoes could have prevented." Consequently, the Board's requirement that patrons of the Library wear shoes satisfies rational basis review.

D.

Neinast claims that Black presently is "enforcing a barefoot policy that is not authorized by State Law" or by the Board, and that Johnson "enforced that barefoot policy in a manner sanctioned by neither State Law, nor the Eviction Procedure," thereby depriving Neinast of procedural due process. These claims lack merit.

First, Neinast cannot base his procedural due process claim on the Board's allegedly "improper adoption of a rule of general applicability." *Reichelt v. Gates*, 967 F.2d 590, 1992 WL 127057, at *2 (9th Cir. June 11, 1992) (citing *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-46 (1973)). "Governmental determinations of a general nature that affect all equally do not give rise to a

due process right to be heard." *Nasierowski Bros. Inv. Co. v. City of Sterling Heights*, 949 F.2d 890, 896 (6th Cir. 1991). Since the requirement that all patrons of the Library wear shoes is of general applicability, Neinast's procedural due process rights have not been violated with respect to the provision's adoption.

Neinast admits that the Board "properly promulgated their Patron Regulations," but observes that the Patron Regulations themselves contain no express requirement that patrons of the Library wear shoes. However, the issue of whether the Board's delegation of authority to the Executive Director to establish the Eviction Procedures was proper is a matter of state law. Section 1983, upon which Neinast bases his claim, authorizes courts to redress violations of "rights, privileges, or immunities secured by the Constitution and [federal] laws" that occur under color of state law. "The statute is thus limited to deprivations of federal statutory and constitutional rights. It does not cover official conduct that allegedly violates state law." *Huron Valley Hosp., Inc. v. City of Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989) (citing *Baker v. McCollan*, 443 U.S. 137, 146 (1979)). Neinast concedes that the Board's delegation of authority to Black "regarding internal polices and procedures" was proper, but argues that Black "was not granted the authority to create and enforce an *external regulation*."[3] Neinast's claim turns upon a question of state law – namely, the amount of rulemaking authority the Board properly can delegate to its Executive Director under Ohio Revised Code § 3375.40 – and thus falls outside the scope of § 1983.

With regard to his second claim, Neinast argues that the procedures employed by Johnson when serving

[3] Neinast mischaracterizes the extent of the authority granted to Black by the Board. As previously noted, Black was not merely limited to "internal policies and procedures," but also was responsible for "public relations, relations with the community, ... and the handling of all other matters involved with the operation of the library system."

Neinast with a one-day eviction from the Library departed from the Eviction Procedure, thereby depriving him of procedural due process. The Eviction Procedure states that patrons wearing "inappropriate dress, to include but not be limited to: no shirts and no shoes" are to be "asked to leave [the] premises to correct the problem." After violating this provision on March 2, 2001, however, Neinast was served with a one-day eviction for a violation described as "improper dress/staff harassment."

While "[t]he touchstone of due process is protection of the individual against arbitrary action of government," *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974), the fact that Johnson did not follow the Eviction Procedure, standing alone, does not establish a denial of due process. "Due process of law guarantees 'no particular form of procedure; it protects substantial rights.'" *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 610 (1974) (quoting *NLRB v. Mackay Co.*, 304 U.S. 333, 351 (1938)). It is unclear what level of process Neinast claims he was entitled to receive. The Supreme Court has observed that "'[d]ue process is flexible and calls for such procedural protections as the particular situation demands.'" *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). At a minimum, however, "'[p]arties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Baldwin v. Hale*, 1 Wall. 223, 233, 17 L.Ed. 531 (1864)). Here, immediately prior to Neinast's eviction on March 2, 2001, Chris Taylor (another employee of the Library) and Johnson discussed the eviction procedure with Neinast. Neinast was notified of the charges against him by Johnson, who stated that "he was harassing the staff by continuing to come in without his shoes on." Neinast expressed his disagreement and "reminded [Taylor and Johnson] that [the Library's] procedure only states that [the Library] may ask him to leave." Neinast thus was provided with notice of the charges against him and "'an

opportunity to present his side of the story.'" *Boals v. Gray*, 775 F.2d 686, 690 (6th Cir. 1985) (quoting *Goss v. Lopez*, 419 U.S. 565, 581 (1975)). Regardless of what procedure is generally due when a patron of a public library contests charges giving rise to a proposed short-term eviction, under the particular facts of this case the procedure by which Neinast was evicted was constitutional. Consequently, summary judgment for defendants-appellees was proper.

III.

For all of the foregoing reasons, we affirm the judgment of the district court.

APPENDIX B

190 F.Supp.2d 1040

Robert A. NEINAST, Plaintiff

v.

BOARD OF TRUSTEES OF THE COLUMBUS METROPOLITAN LIBRARY, et al., Defendants.

No. C2-01-443.

United States District Court,
S.D. Ohio,
Eastern Division.

March 27, 2002.

Robert A. Neinast, Pickerington, OH, pro se.

Catherine Adams, Philomena M. Dane, Columbus, OH, for defendants.

ORDER AND OPINION

This matter is before the Court on cross-motions for summary judgment filed by Defendants on August 2, 2001, and by Plaintiff on September 17, 2001. Oral argument was heard on Friday, February 22, 2002. For the following reasons, the Court **GRANTS** Defendants' Motion and **DENIES** Plaintiff's Motion.

I. STATEMENT OF FACTS

Plaintiff, Robert A. Neinast ("Neinast"), is a resident of Pickerington, Ohio who regularly goes barefoot. Defendant, Board of Trustees of the Columbus Metropolitan Library ("The Board"), is a body that serves as a regulating authority of the Columbus Metropolitan Library ("the Library"). Plaintiff often utilizes the Library. Defendant, Larry D. Black ("Black"), is the Director of the Library and Defendant, Vonzell Johnson ("Johnson"), is the Assistant Manager of Security for the Library.

From 1997 through 2001, Plaintiff was asked to leave the Library on different occasions because he did not comply with the Library's regulation that required wearing shoes while on its premises. On September 12, 1997, Plaintiff was asked for the first time to leave the Library for not wearing shoes. In November 2000, Plaintiff was again informed that he would have to wear shoes in order to use the Library's facilities. In January 2001, Plaintiff was asked to leave for the same reason. On March 2, 2002, Plaintiff entered the Library barefoot, and was subsequently presented with a one-day eviction from the Library that was approved by Defendants Black and Johnson. The Patron Regulations of the Library do not contain a prohibition on using the Library without shoes. The Library's Eviction Procedure, however, does provide for eviction of patrons not wearing shoes.

After being evicted, Plaintiff wrote letters to Defendant Black and members of the Board, complaining of the enforcement of the Eviction Procedure and its inconsistency with the Patron Regulations. In response, the Board informed Plaintiff that it authorized the procedure, and that Black, as Executive Director, was granted the authority to make decisions, including eviction, in accordance with the Library Organization Policy. Under the Library Organization Policy, the Executive Director has authority in "determining internal policies and procedures [for] ... public relations, relations

with the community and governmental agencies, and the handling of all other matters involved with the operation of the library system." In addition, Black asked the Franklin County Prosecutor's Office to determine the legality of the Library's shoe regulation. Subsequently, the Prosecutor's office issued in an opinion supporting the view that the regulation requiring shoes was constitutional.

Plaintiff sent a follow-up letter to Defendant Black and Philip C. Johnston, who became President of the Board in January 2001, and Black responded.

II. PROCEDURAL HISTORY

On April 3, 2001, Plaintiff, acting pro se, filed a Complaint containing three causes of action, alleging violations of 42 U.S.C. §1983 based on deprivations of his First, Ninth, and Fourteenth Amendment rights under the United States Constitution, and his rights under Article I of the Ohio Constitution. Plaintiff requested declaratory judgment, permanent injunction, and damages from the Franklin County Court of Common Pleas. Defendants removed this matter to this Court on May 11, 2001. Defendants filed an Answer on May 24, 2001, after which Plaintiff filed an Amended Complaint on June 27, 2001. On July 9, 2001, Defendants filed an Answer to the Amended Complaint and filed a Motion for Summary Judgment on August 2, 2001. Plaintiff filed a Motion for Summary Judgment on September 17, 2001.

III. STANDARD OF REVIEW

In reviewing cross-motions for summary judgment, courts should "evaluate each motion on its own merits and view all facts and inferences in the light more favorable to the nonmoving party." *Wiley v. United States*, 20 F.3d 222, 224 (6th Cir. 1994). Significantly, "[t]he filing of cross-motions for summary judgment does not necessarily mean that parties consent to resolution of the case on the existing record or that the district court is free to treat the case as if it was submitted for final resolution on a

stipulated record." *Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991) (citing *John v. State of La. (Bd. of Trustees for State Colleges & Univ.)*, 757 F.2d 698, 705 (5th Cir. 1985)).

The standard of review for cross-motions for summary judgment does not differ from the standard applied when a motion is filed by one party to the litigation. *Taft Broad.*, 929 F.2d at 248. Summary judgment is therefore appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." FED.R.CIV.P.56(c). The movant has the burden of establishing that there is no genuine issues of material fact, which may be accomplished by demonstrating that the nonmoving party lacks evidence to support an essential element of its case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Barnhart v. Pickrel, Schaeffer & Ebeling Co.*, 12 F.3d 1382, 1388-89 (6th Cir. 1993). In response, the nonmoving party must present "significant probative evidence" to show that "there is [more than] some metaphysical doubt as to the material facts." *Moore v. Philip Morris Cos.*, 8 F.3d 335, 339-40 (6th Cir. 1993). "[S]ummary judgment will not lie if the dispute is about a material fact that is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (concluding that summary judgment is appropriate when the evidence could not lead the trier of fact to find for the nonmoving party).

IV. ANALYSIS

Plaintiff's Complaint contains three causes of action based on violations of 42 U.S.C. §1983. Section 1983 reads, in relevant part:

> Every person who, under color of any statute, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress... .

42 U.S.C. § 1983. In order to succeed on a claim for a violation of § 1983, Plaintiff must show that (1) a person (2) acting under color of law (3) deprived him of his rights secured by the United States Constitution or its laws. *Berger v. City of Mayfield Heights*, 265 F.3d 399, 405 (6th Cir. 2001).

A. Plaintiff's First Cause of Action

Plaintiff's first cause of action alleges violations of §1983 based on deprivations of his freedom of speech under the First and Fourteenth Amendments.

a. Plaintiff's Time, Place, and Manner Claim

Plaintiff argues that the Library is a public forum and that its regulations must be analyzed under strict scrutiny, because he has a right of access to speech in the Library. Plaintiff asserts that the Library's Eviction Procedure does not protect the safety or welfare of the general public, but instead attempts to protect the Plaintiff from himself. Neinast claims that being barefoot has not and will not harm any other Library patrons. Furthermore, the injuries that a barefoot person would likely sustain would also occur to one who was wearing shoes. In fact, Plaintiff argues that barefoot persons would be more likely to anticipate certain dangers, such as a wet floor. Neinast further contends that, because the likelihood of a barefoot injury is so small, the Eviction

Procedure is excessive and does not leave open ample alternative channels of protected communication.

Assuming, *arguendo*, that walking barefoot constitutes speech and Plaintiff has a right of access to speech, the Court finds that the Library's shoe requirement passes constitutional muster. First, a public library is clearly a limited public forum. *See, e.g., Kreimer v. Bureau of Police*, 958 F.2d 1242, 1257 (3rd Cir. 1992).[1] As a limited public forum, "the Library is obligated to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum," but "[o]ther activities need not be tolerated." *Id.* at 1262. Indeed, a library need not be open "for the exercise of all First Amendment activities merely because [it is open] for the exercise of certain specified First Amendment activities." *Id.* at 1262 n.21. In a limited public forum, "[r]easonable time, place and manner regulations are permissible... ." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). Content-neutral "time, place, or manner regulations that limit permitted First Amendment activities within a designated public forum are constitutional only if they are 'narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels of information.'" *Kreimer*, 958 F.2d at 1262 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). And "the requirement of narrow

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[1] As the Third Circuit stated:

> It is clear to us that a public library, albeit the 'quintessential' locus for the exercise of the right to receive information and ideas, is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum. Obviously, a library patron cannot be permitted to engage in most traditional First Amendment activities in the library, such as giving speechs. ...

Kreimer, 958 F.2d at 1257.

tailoring is satisfied 'so long as ... the regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward*, 491 U.S. at 799 (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)); *see also Turner Broadcasting System, Inc. v. F.C.C.*, 520 U.S. 180, 189 (1997) (subject to intermediate scrutiny, a "content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests").

In this case, to the extent that it limits Plaintiff's right of access to speech, the Library's shoe regulation satisfies this intermediate scrutiny. The shoe requirement is a valid, content-neutral regulation that promotes communication of the written word in a safe and sanitary condition. As evidenced by various incident reports, the Library's floor sometimes contains feces, semen, blood, and broken glass, all of which pose a significant danger to barefoot individuals. The Library determined that a blanket prohibition on walking barefoot was a reasonable means of minimizing these dangers. Health and safety concerns are, of course, substantial government interests. *See, e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) ("Throughout our history the several states have exercised their police powers to protect the health and safety of their citizens."). Here, the safety of patrons would be achieved less effectively absent the Library's regulation. The regulation also leaves open other channels of communication, as Neinast can use the Library so long as he wears shoes, and he may still inform others of his views on the ostensible virtues of being barefoot. Thus, in this limited public forum, the Plaintiff can be restricted in walking barefoot.

b. Plaintiff's Symbolic Speech Claim

Plaintiff argues that going barefoot in public buildings is not illegal under state or federal law, and makes much of the fact that he has been admitted to several public

places while barefoot. Neinast regularly carries with him letters from the State of Ohio and county health departments confirming that there are no regulations against going barefoot. Not surprisingly, he is often approached by curious onlookers who question his going barefoot. Plaintiff argues that his conduct conveys a message to others and is symbolic speech protected by the First Amendment, which is not disruptive or inconsistent with the stated purpose of the Library.

Plaintiff's argument fails to meet the Supreme Court's standard for symbolic speech. To be sure, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Dallas v. Stanglin*, 490 U.S. 19, 25 (1989). Courts apply a two-pronged test to determine whether conduct is protected "symbolic speech": (1) whether "an intent to convey a particularized message was present"; and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 409 (1974).

In the matter *sub judice*, Plaintiff's going barefoot does not "convey a particularized message," and is conduct that may be regulated. Courts have found that the first prong of the Spence test is satisfied through specific political, ideological, or religious messages. *See, e.g., Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969) (wearing black arm bands to protest the Vietnam War was symbolic speech); *Texas v. Johnson*, 491 U.S. 397 (1989) (burning an American flag while chanting, "red, white, and blue, we spit on you," at the Republican National Convention to protest the policies of the Reagan administration was expressive conduct). *But see Stanglin*, 490 U.S. 19 at 24-25 (individuals meeting for recreation dancing are not taking positions on public questions and are not engaged in particularized expression). Plaintiff's going barefoot, like

the plaintiff's acts in *Stanglin*, does not indicate an intent to convey a particularized message.

Plaintiff fails to meet the *Spence* standard's second element because his conduct occurred in a library rather than a political setting, and there is not a great likelihood that other Library patrons will understand his purported message. The *Spence* Court noted that the factual context and environment in which the message is viewed has a strong influence on the clarity or understanding of the message. *Spence*, 418 U.S. at 409-410. In this case, absent the letters from federal and state agencies that Plaintiff carries with him, many patrons may be confused when seeing Plaintiff barefoot, given the Library's nonpolitical environment. Furthermore, Plaintiff's message does not bear on a matter of public concern. A particular expression addresses a matter of public concern where it can be fairly considered as "relating to any matter of political, social, or other concern to the community... ." *Connick v. Myers*, 461 U.S. 138, 147 (1983).

The Sixth Circuit has held that speech does not touch on a matter of public concern where its aim is to air or remedy grievances of a purely personal nature. *Valot v. Southeast Local School Board of Education*, 107 F.3d 1220, 1226 (6th Cir. 1997) (ruling that a school district's refusal to rehire part time bus drivers who had received unemployment compensation was not unconstitutional because the drivers' request for unemployment compensation during the summer was more a matter of private interest than public concern, and thus unprotected by the right to petition for redress of grievances.) Plaintiff's intent to inform others about the benefits of being barefoot is a personal goal that bears little relation to a political, religious, or ideological issue of public concern. He goes barefoot, in part, to inform others that he does not approve of wearing shoes, because he believes that it is more healthy to go barefoot. But Plaintiff has not indicated that he has challenged shoe requirements at public forums nationally. Instead, he simply carries letters

from health agencies allowing him to walk barefoot. His actions have not advocated that every barefoot person in America should be given the same treatment. Neinast has failed to meet the requirements for symbolic speech.

Thus, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment as to Plaintiff's first cause of action.

B. Plaintiff's Second Cause of Action

Plaintiff's second cause of action alleges violations of §1983 based on deprivations of his liberty interest under the First, Ninth, and Fourteenth Amendments. Plaintiff argues that the right of personal appearance is a liberty interest protected by the Fourteenth Amendment's Due Process Clause. Plaintiff contends that courts have applied a rational basis review to personal appearance regulations only when they pertain to government employees and that, since he is a private citizen, the Court should employ a more exacting strict scrutiny analysis. But even under rational basis review, Neinast claims that there is no rational link between the Eviction Procedure and the Library's claimed interest. Finally, Plaintiff maintains that even if there is no fundamental right to personal appearance, courts have recognized a liberty interest that the Library's shoe regulation infringes.

The Court finds that Plaintiff's second cause of action fails. The right of personal appearance is not clearly articulated as a fundamental or protected right within the Constitution, and the Supreme Court has not recognized it as a substantive right. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976). Instead, the *Kelley* Court only assumed that such a liberty interest may be cognizable, but this right alone does not warrant the same strict scrutiny analysis given other fundamental rights such as those of speech, religion, and privacy.

Various courts have upheld public forum regulations pertaining to personal appearance. The Sixth Circuit, for

instance, held that a policy regulating hair length at public schools did not violate the First, Fourth, Fifth, Ninth, or Fourteenth Amendment, and should be upheld if there is a "real and reasonable" connection to the public forum's operations and purpose. *See Jackson v. Dorrier*, 424 F.2d 213, 218 (6th Cir. 1970). And the Third Circuit upheld a library policy that prohibited barefoot patrons as well as those with offensive bodily hygiene from using the library facilities.[2] *Kreimer*, 958 F.2d 1242. Thus, as a limited public forum, the Library has the right to limit the personal appearance of its patrons based on a legitimate government objective.

Because freedom of appearance is not a fundamental right, restrictions on it should be reviewed on a rational basis. Under such scrutiny, the court will not overturn the Library's regulation unless it is so unrelated to the achievement of any combination of legitimate purposes that the court can only conclude that the Library's policy was irrational. *See Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 84. In this case, the Library's safety interests are reasonably connected to the shoe requirement and, thus, satisfy rational basis review. As a limited public forum, the Library need not allow all modes of speech simply because it promotes some modes of speech. Although Plaintiff may be able to enter other public forums, he is not guaranteed the same access at the Library if he chooses to ignore its shoe requirement.

The Court, therefore, **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment as to the Plaintiff's second cause of action.

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[2] The regulations upheld in Kreimer stated: "Patrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is so offensive so as to constitute a nuisance to other persons shall be required to leave the building... ." *Kreimer*, 958 F.2d at 1248.

C. Plaintiff's Third Cause of Action

Plaintiff's third cause of action alleges violations of § 1983 based on deprivations of his substantive and procedural due process and equal protection rights under the Fourteenth Amendment, and Article I of the Ohio Consitution.

a. Plaintiff's Due Process Claim

Plaintiff argues that the Library's policies were not administered properly by Defendants Black and Johnson, and that he was denied procedural due process. Neinast contents that there is no mention of a shoe requirement in the Patron Regulations or in any state statute, and that the Board is not able to issue such a legislative regulation, as it should have been delegated by a health department. Plaintiff argues that the Board has no health and safety expertise and is only experienced in operating a Library. Plaintiff claims that even if the Board did have the authority to regulate barefoot patrons, it has not done so properly through the Patron Regulations. Neinast argues that the shoe policy was created to establish a dress code rather than to safeguard the health and safety of patrons. Plaintiff asserts that Black did not comply with the Eviction Procedure when he evicted Plaintiff, as there is no language in the Eviction Procedure providing for a one-day eviction. Finally, Neinast claims that he has been deprived of his property interest in using the Library, and that he has no adequate remedy at law.

The Court finds Plaintiff's procedural due process claim meritless. There is no dispute that Defendants Black and Johnson acted under color of state law when they evicted Plaintiff. The issue is whether their conduct has deprived Plaintiff of his constitutional due process rights. The Supreme Court has held that no procedural due process right exists in the generalized rulemaking process of political subdivisions or agencies. *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 244-46 (1973) (contrasting due process rights in individual

administrative adjudication with the absence of such rights in administrative rulemaking). The Library in this case is similar to a political subdivision or agency, as the Ohio state legislature established free public libraries in the counties and appointed the Defendant Board of Trustees. Plaintiff's procedural due process rights have not been violated, because the shoe requirement is of general applicability.

Plaintiff's remaining procedural argument is that the Board exceeded its statutory authority under O.R.C. § 3375.40, which is its authorizing statute. But this is a question of state law, and mere allegations of state law are not sufficient to state a claim under § 1983. *See Huron Valley Hosp. Inc. v. Pontiac*, 887 F.2d 710, 714 (6th Cir. 1989) (section 1983 "does not cover official conduct that allegedly violates state law"). As Neinast's procedural due process arguments are based not on a constitutional right but on state statutory interpretation, they fail to state a claim upon which relief can be granted under § 1983.

Neinast has also failed to demonstrate that he was deprived of any substantive due process rights as a result of his eviction. Substantive due process "affords only those protections 'so rooted in the traditions and conscience of our people as to be ranked as fundamental' ... . It protects those interests ... implicit in the concept of ordered liberty ... like personal matters of marriage and family." *Charles v. Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (citations omitted). This case implicates no such fundamental interest.

As officers of the Library, Black and Johnson had the authority to interpret the Library's policies in a manner that would maintain efficient daily operations. The Eviction Procedure was used to promote legitimate interests such as the safety of all library patrons and the fiscal integrity of the Library in preventing possible lawsuits. Defendants did not abuse their authority when evicting Plaintiff.

b. Plaintiff's Equal Protection Claim

Plaintiff argues that the shoe regulation violates his equal protection rights because it favors one mode of footwear over the other, and violates the rights of a whole class of citizens, the Society for Barefoot Living, of which he is a member.

The Court finds that Defendants have not violated Plaintiff's equal protection rights. "The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 439 (1985) (citation omitted). To prevail on an Equal Protection claim, Plaintiff must show that the Library discriminated against him because of membership in a protected class. *Henry v. Metropolitan Sewer Dist.*, 922 F.2d 332 (6th Cir. 1990). Neinast claims that he is a member of a suspect class consisting of people who choose to go barefoot. Yet, such a class of protected individuals has never been recognized in the courts. Even if it were recognized, shoe regulations would only necessitate rational basis scrutiny, as heightened scrutiny is reserved for classifications made on the basis of race, gender, alienage, and national origin. *See Cleburn*, 473 U.S. at 440. To withstand such review, the Library's policy must be rationally related to a legitimate purpose. *Id.* at 446. As the Library's regulation is rationally related to legitimate public safety concerns, Plaintiff has failed to state a valid Equal Protection claim.

Thus, the Court **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment as to Plaintiff's third cause of action.

D. Defendants' Qualified Immunity Defense

Defendants Black and Johnson argue that they are entitled to qualified immunity. As public employees in a

limited public forum, Black and Johnson claim that they were not put on notice by any clearly established law that their treatment of Neinast was unlawful. Defendants also cite an advisory opinion of the Franklin County Prosecutor's Office that their actions were completely lawful.

The Court agrees and find that Defendants Black and Johnson are shielded from any liability in this case. The affirmative defense of qualified, or good faith, immunity shields "government officials performing discretionary functions ... from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citation omitted). Thus, an official may be held personally liable for civil damages for unlawful offical action if that action was not objectively reasonable "in light of the legal rules that were 'clearly established' at the time it was taken." *Anderson v. Creighton*, 483 U.S. 635, 639 (1987) (citation omitted). This objective legal reasonableness standard analyzes claims of immunity on a fact-specific, case-by-case basis to determine whether a reasonable official in the defendant's position could have believed that his or her conduct was lawful, judged from the perspective of the reasonable official on the scene. *See Anderson*, 483 U.S. at 640-41.

To survive a motion for summary judgment in the context, Plaintiff must allege specific facts demonstrating that "a clearly established" right has been violated. Neinast has failed to do so. None of Plaintiff's allegations regarding supposed deprivations of his First, Ninth, and Fourteenth Amendment rights have held up to scrutiny. Thus, Defendants Black and Johnson are entitled to qualified immunity from Plaintiff's claims.

The Court, therefore, **GRANTS** Defendants' Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment as to Defendants' claim of qualified immunity.

V. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment in its entirety and **DENIES** Plaintiff's Motion for Summary Judgment in its entirety.

IT IS SO ORDERED.

APPENDIX C

No. 02-3482

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT A. NEINAST,
Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF THE COLUMBUS METROPOLITAN LIBRARY; ET AL.
Defendants-Appellees.

FILED
Dec 19 2003
LEONARD GREEN
Clerk

ORDER

BEFORE: KENNEDY, GILMAN, and GIBBONS, Cicuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active* judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

* Judge Moore recused herself from participation in this ruling.

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk